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PRESERVING THE RIGHT TO A JURY TRIAL IN PUBLIC EMPLOYEE FREE SPEECH LITIGATION: THE PROTECTED STATUS OF SPEECH MUST BE LABELED A MIXED QUESTION OF LAW AND FACT

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PRESERVING THE RIGHT TO A JURY TRIAL IN PUBLIC EMPLOYEE FREE SPEECH LITIGATION: THE PROTECTED STATUS OF SPEECH MUST BE LABELED A MIXED QUESTION OF LAW AND FACT

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I. INTRODUCTION

"The life of the law has not been logic: it has been experience."[1] However, the law is multiple experiences, not one. Litigation brings these various experiences together. While plaintiffs, defendants, and their attorneys each have different backgrounds and different interests that affect the course of litigation, the adjudicators within a case—the trial judge, the jury, and appellate judges—have an equally important impact on a case's outcome. The right to a jury trial preserved by the Seventh Amendment helps determine the extent to which the adjudicators impact the outcome of a particular case.

Implicit within the right to a jury trial are considerations regarding which adjudicator properly decides each issue, a determination which takes into account the various experiences of each adjudicator. Trial judges have general legal experience as they regularly interpret the written law and construe legal documents.[2] Full dockets also provide trial judges with administrative experience.[3] In contrast to trial judges, juries generally lack familiarity with the law. Jurors compensate for their lack of legal know-how with practical experience. Collectively, the jury contributes its real world experience, which each individual juror gained through his or her unique life experiences, various occupations, and differing educational backgrounds.[4] In the background of any discussion on trial level adjudicators lurks the threat of appeal to appellate courts with appellate judges. Appellate judges are ideally selected for their legal expertise and experience.[5] While trial judges have legal experience, appellate judges generally have a broader and deeper perspective, since they are exposed to a wide range of cases and have "a greater opportunity to research, analyze, discuss, and debate

1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

2. *See* Ronald R. Hofer, *Standards of Review – Looking Beyond the Labels*, 74 MARQ. L. REV. 231, 239 (1991); Nichole Biglin, *Enablement: For the Judge or the Jury? Markman v. Westview Instruments, Inc.'s Analysis Applied*, 52 DRAKE L. REV. 145, 156 (2003).

3. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC.& PROCESS 101, 105 (2005).

4. Julia Reytblat, *Is Originality in Copyright Law a "Question of Law" or a "Question of Fact?": the Fact Solution*, 17 CARDOZO ARTS & ENT. L.J. 181, 196 (1999).

5. Warner, *supra* note 3, at 105.

important legal issues."[6] As with all litigation, adjudicators' experiences interact in public employee free speech suits.

The Supreme Court has held that whether a public employee's speech is constitutionally protected is a question of law for the judge to determine.[7] However, the Court's holding in *Garcetti v. Ceballos*[8] altered the analysis used when determining if a public employee's speech is constitutionally protected. By altering the test, the Court opened the door to questioning the traditional holding that the protected status of speech is a question of law. Through this open door, multiple circuits have weighed in, creating a circuit split as to whether that determination is to be made by the judge or the jury. This Comment argues that in order to protect the substance of the jury trial right and in light of the Court's recent changes to the public employee free speech analysis, the inquiry into the protected status of public employee speech must be a mixed question of law and fact.

Part II of this Comment addresses the right to a jury trial preserved by the Seventh Amendment in conjunction with 42 U.S.C. § 1983. Part II also addresses the proper allocation of responsibility to the judge and the jury. Part III explores the Supreme Court's test for analyzing public employee free speech. Part IV uses the Ninth Circuit's decision in *Posey v. Lake Pend Oreille School District No. 84*[9] to address the circuit split. Part V synthesizes the previous portions of the Comment to argue that the protected status of speech must be labeled a mixed question of law and fact in order to protect the substance of the right to a jury trial. Finally, Part VI concludes that the uncertainty introduced by the Supreme Court's *Garcetti* decision should be resolved by adopting the Ninth Circuit's approach in *Posey*.

II. THE RIGHT TO A JURY TRIAL: THE SEVENTH AMENDMENT AND 42 U.S.C. § 1983

Lord Coke's axiom that "[j]udges decide questions of law; juries decide questions of fact" provides the origins of the question of law/fact dichotomy.[10] The rule has been generally accepted since the mid-

6. *Id.*

7. *See* Connick v. Myers, 461 U.S. 138, 148 n.7 (1983).

8. 547 U.S. 410 (2006).

9. 546 F.3d 1121 (9th Cir. 2008).

10. The quotation is a translation of Lord Coke's rule "'ad questioniam facti non respondent judices, . . . ad questioniam juries non respondent juratores.'" J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 485 n.7 (1985) (quoting 1 E. COKE, COMMENTARY OF LITTLETON *155.b).

sixteenth century and is recognized by the Supreme Court.[11] However, the rule only applies when there is a jury trial.[12] In the United States, the Seventh Amendment serves as the basis for the right to a jury trial. The Seventh Amendment states, "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . according to the rules of the common law."[13] The vagueness of this language preserves an undefined right to trial by jury, which poses two key questions: what causes of action trigger the jury right and what questions must be decided by the jury once the right is triggered?[14] Each of these questions will be addressed below.

A. Triggering the Right to Trial by Jury

The Federal Rules of Civil Procedure incorporate the Seventh Amendment's preservation of the right to a jury trial.[15] Federal Rules of Civil Procedure Rule 38(b) permits any party to demand their right to trial by jury as preserved by the Seventh Amendment or as provided for by a federal statute.[16] A public employee attempting to vindicate infringements on their right to freedom of speech asserts their claim through federal statute.[17] Therefore, the right to a jury trial must be analyzed under both the Seventh Amendment and as guaranteed by the requisite federal statute.

1. Trial by Jury Under the Seventh Amendment

The Seventh Amendment preserves the right to a jury trial in suits at common law.[18] This language refers to suits for legal rights but not for equitable rights.[19] At the time the Seventh Amendment was adopted suits for legal and equitable rights were adjudicated in separate forums; however, the Federal Rules of Civil Procedure created a unified system

11. Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.").

12. FED. R. CIV. P. 52(a)(1). "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately." *Id.*

13. U.S. CONST. amend. VII.

14. Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1126 (2003).

15. FED. R. CIV. P. 38.

16. FED. R. CIV. P. 38(a), (b).

17. 42 U.S.C. § 1983 (2006).

18. U.S. CONST. amend. VII; Parsons v. Bedford, Breedlove & Robeson, 28 U.S. 433, 447 (1830).

19. U.S. CONST. amend. VII; *Parsons*, 28 U.S. at 447.

under which legal and equitable rights can both be adjudicated in the same forum.[20] Despite this merger, the Supreme Court "has carefully preserved the right to trial by jury where legal rights are at stake."[21] The Supreme Court has held that whether a particular suit resolves legal rights depends on a two-step analysis: "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."[22] When engaging in this two-step analysis, the Court has stated that "[t]he second inquiry is . . . more important."[23] One justice has suggested dispensing with the first inquiry altogether and basing the right to a jury trial solely on the remedy sought.[24]

In *Teamsters Local 391 v. Terry*,[25] the Supreme Court applied this two-step process to determine whether a group of truck drivers were entitled to a jury trial in their suit against the local union for breaching their duty of fair representation.[26] The truck drivers were union members,[27] who received seniority status within the company as compensation for transferring to other cities.[28] After they moved, the truck drivers lost their bargained-for seniority status due to multiple lay-offs.[29] Following receipt of the truck drivers' grievance, the union's grievance committee determined the employer violated the truck drivers' rights and ordered the company to recognize the drivers' seniority status.[30] Despite this ruling, the company continued to function in a way that deprived the drivers of their seniority status.[31] As a result, two more grievances were filed with the union.[32] The union refused to take

20. "There is one form of action—the civil action." FED. R. CIV. P. 2. *See* RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 529–31 (4th ed. 2008).

21. Teamsters Local No. 391 v. Terry, 494 U.S. 558, 565 (1990).

22. Tull v. United States, 481 U.S. 412, 417–18 (1987) (citations omitted).

23. *Teamsters*, 494 U.S. at 565.

24. *Id.* at 574 (Brennan, J., concurring in part and concurring in the judgment). Although Justice Brennan agreed that the truck drivers were entitled to a jury trial, he indicated that the Court continues to diminish "the significance of the analogous form of action for deciding where the Seventh Amendment applies. I think it is time we dispense with it altogether." *Id.*

25. 494 U.S. 558 (1990).

26. *Id.* at 562–63, 565.

27. *Id.* at 561.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 562.

32. *Id.*

action on the third grievance.[33]

After being denied relief within the union, the truck drivers filed suit against the union for "violat[ing] its duty of fair representation."[34] The truck drivers sued for "compensatory damages[,] for lost wages and health benefits" and requested a jury trial.[35] The request was granted by the district court and affirmed by the Fourth Circuit.[36] The union appealed.[37]

The Supreme Court affirmed the truck drivers' right to a jury trial.[38] Under the first step of the analysis, the Court attempted to find a common law analogy to a suit alleging breach of a union's duty; they held the issue was "comparable to a breach of contract claim—a legal issue."[39] The Court proceeded to the second step and determined that a damages remedy was traditionally a legal remedy.[40] Since both inquiries indicated the suit was a legal action, the Court held that the truck drivers were entitled to a trial by jury.[41]

2. Trial by Jury Under 42 U.S.C. § 1983

The right to a jury trial can be granted by federal statute.[42] When a public employee sues his government employer, the appropriate federal statute depends on the individual's employer. If the public employee is employed by a state or municipal government, the employee would bring suit under 42 U.S.C. § 1983.[43] A § 1983 suit requires two

33. *Id.*

34. *Id.*

35. *Id.* at 563.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 566–70.

40. *Id.* at 570–71. While damages are generally viewed as a legal remedy, there are two exceptions in which damages are equitable. *Id.* The first exception is when damages are restitutionary. *Id.* The second is when the monetary damages are either incidental or intertwined with injunctive relief. *Id.*

41. *Id.* at 573.

42. FED. R. CIV. P. 38(b).

43. *See* 42 U.S.C. § 1983 (2000) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.").

elements. First, the plaintiff must have been deprived of a right secured by the "Constitution and laws" of the United States.[44] Second, the defendant must have acted under color of state law.[45] This second requirement precludes § 1983 suits against federal officials, as these officials do not act under state law. The language of § 1983 precludes suit against a federal government employer.[46] This Part will focus on the right to a jury trial under § 1983.

Although any party in an action can assert the right to a jury trial if the right is provided for by a federal statute,[47] § 1983 "does not itself confer the jury right."[48] Therefore, the Supreme Court has analyzed the right to a jury trial in a § 1983 suit under the Court's traditional Seventh Amendment two-part analysis.[49] Under the historical analysis prong, the Court concluded the analysis is based on § 1983 as a statute instead of the underlying constitutional right vindicated.[50] With this in mind, the Court noted § 1983 did not have an equivalent at the time the Seventh Amendment was adopted.[51]

Despite the lack of an historical analogy, the Supreme Court has traditionally held that the Seventh Amendment extends to statutory claims unknown at common law when the suit is in essence a tort action

44. *Id.*; Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

45. 42 U.S.C. § 1983; *Adickes*, 398 U.S. at 150.

46. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 605 (5th ed. 2007). The intricacy of a public employee suing their federal employer is beyond the scope of this Comment. In brief, the Supreme Court held in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, that the federal government could be sued for a constitutional violation without a statutory grant of authority. 403 U.S. 388, 392 (1977). The key proposition of *Bivens* was that "the judicial branch can enforce the Constitution without congressional action." *See* Susan Bandes, *Reinventing Bivens: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 291 (1995). *See also* JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 73 (2d ed. 2007) ("Although *Bivens* created the possibility that individuals whose constitutional rights are violated by federal officers can receive compensation, success is rare"). The Supreme Court limited *Bivens*' application in *Bush v. Lucas*, 462 U.S. 367 (1983). In *Bush*, the Court concluded that the presence of an alternative remedial structure foreclosed bringing suit under *Bivens*. *Id.* at 368. A NASA employee attempted to sue his employer for retaliating against his speech critical of NASA. *Id.* at 369–71. The Court refused to apply *Bivens* since the claims were cognizable within a congressional statutory scheme. *Id.* at 385–86. The Court indicated that federal civil servants were "protected by an elaborate, comprehensive scheme that encompasse[d] substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed;" the employee's claim was fully cognizable within the scheme precluding *Bivens*' application. *Id.* Ultimately, "federal employees with federal constitutional claims for damages will nearly always have a remedy under the Civil Service Reform Act," precluding their use of *Bivens*. *See* JEFFRIES, *supra*, at 74.

47. FED. R. CIV. P. 38(a)–(b).

48. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999).

49. *Id.* at 708.

50. *Id.* at 711.

51. *Id.* at 709.

seeking legal relief.[52] Citing its precedent, the Court concluded that claims brought under § 1983 sound in tort.[53] Based on this analysis, the Court held if a § 1983 suit seeks legal relief it is an action at law under the Seventh Amendment.[54] Therefore, the right to a jury trial in a § 1983 suit is based on the type of relief sought.[55]

Once it has been determined that the right to a jury trial exists, the court must determine which trial decisions "must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[56] This analysis is discussed in the following subsection.

B. Allocating Responsibility Between the Judge and Jury

Once the right to a jury trial is invoked, the decision-making authority within the trial must be allocated between the judge and the jury. Typically this allocation is done by classifying issues within the trial as questions of law or of fact. When an issue is a mixed question of law and fact, appellate courts can classify the specific issues as either a question of law or of fact.[57] Classification is important since the label affixed dictates who the decision-maker is at trial as well as the scope of appellate review.[58]

In dividing decision-making authority, the general notion is that "juries decide questions of facts and judges decide questions of law."[59] The reservation of the jury's right to determine questions of fact is not explicit. However, "the text of the [Seventh] Amendment and relevant statutory provisions from the same time period strongly suggest that a key feature of the jury right was the reservation of factual decisions for

52. *Id.* (citing Curtis v. Loether, 415 U.S. 189, 195–96 (1974)).

53. *Id.*

54. *Id.* at 710. This portion of the opinion is only for a plurality of justices as Justice Scalia did not join the opinion regarding this matter.

55. *Id.* at 710–11.

56. Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

57. Martin B. Louis, *Allocating Adjudicative Decisions Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1017 (1986) ("[T]he lawmaking power of the appellate courts can be subdivided into three subsidiary powers: (1) the law declaration power, which is the power to declare the law and thus to impose on the trial level decision maker general rules affecting all cases that come within the rules' terms; (2) the supervisory power, which is the power to state as a matter of law, generally through rulings on the sufficiency of the evidence, that a particular trial level finding of historical or ultimate fact exceeds the limits of the discretion conferred; and (3) the classification power, which is the power to withdraw particular mixed law/fact questions from the discretionary power of the trial level by clarifying them as questions of law or as constitutional or jurisdictional facts.").

58. Parker, *supra* note 10, at 485.

59. Kirgis, *supra* note 14, at 1131.

the jury."[60] The Re-Examination Clause of the Seventh Amendment states "no fact tried by a jury, shall be otherwise re-examined . . . [except] according to the rules of the common law."[61] While the clause does not expressly allocate all issues of fact to the jury, "it suggests that questions of fact were understood to be peculiarly the jury's province."[62]

The Judiciary Act,[63] which was passed before the adoption of the Seventh Amendment, provides further support for this contention.[64] The Act states that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."[65] Since the first Congress drafted the Judiciary Act and the Seventh Amendment, it can be said that the text of "the Judiciary Act provides a window into the procedural mindset of the first Congress," illuminating the meaning of the Seventh Amendment.[66]

Classifying an issue as a question of law or fact also affects the amount of deference an appellate court gives to a lower court's findings.[67] The Re-Examination Clause of the Seventh Amendment prohibits a fact tried by the jury from being re-examined unless done so in accordance with the common law.[68] Thus, appellate courts generally review findings of fact with great deference, overriding "the decision only if it is very, very wrong."[69] In contrast, findings of law are reviewed by appellate courts "de novo" or without deference.[70]

With this as a background, the Supreme Court, in *Markman v. Westview Instruments Inc.*,[71] provided grounds for determining whether an issue within a trial must be labeled a question of fact for the jury in

60. *Id.* at 1132.

61. U.S. CONST. amend. VII.

62. Kirgis, *supra* note 14, at 1132–33.

63. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

64. Kirgis, *supra* note 14, at 1133.

65. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

66. Kirgis, *supra* note 14, at 1133 (noting that the first Congress "would not have created a constitutional right to a jury trial significantly different from the jury guarantee they had imposed on federal trial courts by statute just two years earlier.").

67. If the parties do not invoke the right to a jury trial under Federal Rule of Civil Procedure 38, the litigation takes the form of a bench trial where the jury's fact-finding authority passes to the trial judge. The trial judge's factual findings are entitled to the same amount of deference as if the findings were made by a jury. *See* Warner, *supra* note 3, at 103–05 ("[F]indings of fact are reviewed with deference regardless of whether they were made by a trial judge or a jury."); FED. R. CIV. P. 52(a)(1) ("In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.").

68. U.S. CONST. amend. VII.

69. Warner, *supra* note 3, at 104–05.

70. *Id.* at 105.

71. 517 U.S. 370 (1996).

order to preserve the substance of the right to a jury trial.[72] In *Markman*, the Court had to decide which judicial actor should determine the construction of a patent. Markman brought suit against Westview and Althon Enterprises for patent infringement, claiming their reporting system, which tracked dry-cleaning charges on a bar code infringed on the patent he had for a reporting system that used bar codes to "log the progress of clothing through the dry-cleaning process."[73] At trial, the jury determined what was covered under Markman's patent, and based on their patent interpretation, they found an infringement.[74] However, the district court interpreted the extent of the patent differently, found no infringement, and granted Westview's deferred motion for judgment as a matter of law.[75]

On appeal, the Supreme Court granted certiorari to determine whether patent construction was an issue the jury was required to determine in order to preserve the right to a jury trial.[76] Using a four-step analysis, the Court determined that the trial judge was the proper party to construe a patent.[77] The first step was to look at whether the specific issue was historically left to a jury at common law, which could be a decisive factor.[78] If history did not answer the question, the analysis proceeds to consider precedent, functional considerations, and the importance of uniformity within that area of law.[79]

In *Markman*, the Supreme Court concluded that history and precedent did not provide any guidance so the Court looked to functional considerations.[80] The Court held that the judge was in a better position to interpret the patent's construction due to the judge's experience, skill, and training in construing written documents.[81] The Court also held that uniformity was important in patent law, which further pointed to the judge being the proper party to determine the construction of a patent.[82]

72. *Id.* at 376.

73. *Id.* at 374–75.

74. *Id.* at 375.

75. *Id.*

76. *Id.* at 376.

77. *Id.* at 377–91.

78. *Id.* at 377 (if the "clear historical evidence that the very subsidiary question was so regarded under the English practice of leaving the issue for a jury," then the issue is required to go to the jury).

79. *Id.* at 384, 388–90.

80. *Id.* at 388.

81. *Id.* at 388–89.

82. *Id.* at 390. In its opinion, the Supreme Court indicated that public policy would be served by uniformity in patent law. *Id.* By allowing parties to know the limitations of a patent, the patentee's inventive genius is protected. *Id.* Furthermore, uniformity avoids a zone of uncertainty, which would discourage future patentees from experimenting for risk of patent infringement. *Id.* The Court also cites to the fact that "Congress created the Court of Appeals for the Federal Circuit as an exclusive appellate

With its *Markman* decision, the Supreme Court "set a precedent for the manner of determining whether an issue should be considered a question of law or of fact, and thus whether the jury or the judge should decide the issue."[83] A court should consider whether a historical analysis places the issue in the purview of a specific judicial actor, and if it does not, the court should consider precedent, functional considerations, and the need for uniformity.[84]

The *Markman* factors are employed to determine if an issue within a trial must be left to the jury in order to maintain the substance of the right to a jury trial. With this in mind, the next two sections explore the issues that must be decided in a public employee free speech trial. Part III examines the Supreme Court's public employee free speech framework. Part IV examines the circuit split that has developed as to whether the constitutionally protected status of a public employee's speech is decided by the judge or the jury. Using the *Markman* factors, Part V argues that at least some of the issues raised in a public employee free speech case must be decided by the jury to preserve the right to a jury trial. Therefore, the protected status of speech must be labeled a mixed question of law and fact.

III. THE SUPREME COURT'S PUBLIC EMPLOYEE FREE SPEECH FRAMEWORK

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech."[85] When the government acts as an employer, the First Amendment's prohibitions linger in the background; these concerns are limited to government action and do not arise in the private employment context.[86] Early in the twentieth century, public employees did not have constitutionally protected rights to free speech as "courts viewed public employment as a privilege that employees were

court for patent cases." *Id*. *See also* H.R. REP. NO. 97-312, at 20–23 (1981) (uniformity would "strengthen the United States patent system in such a way as to foster technological growth and industrial innovation").

83. Biglin, *supra* note 2, at 161–62.

84. *Id.* at 152–57, 161–62.

85. U.S. CONST. amend. I.

86. 42 U.S.C. § 1983 requires that the party acted "under color of any statute . . . of any State or Territory or the District of Columbia." *See* Parker, *supra* note 10, at 511 (American non-union employment is typically at-will employment, which allows the employer to terminate the employment relationship for any reason or no reason at all.); *see also* Gary W. Spring, *A New Methodology for Testing Permissible Communications in the Workplace*, 2008 MICH. ST. L. REV. 1023 (2008) for a discussion of the National Labor Relations Act and an employee's rights to freedom of speech in the context of private union employment.

theoretically free to accept or reject."[87]

Beginning in the 1950s, the Supreme Court shied away from the principle that accepting public employment meant sacrificing constitutional rights. In examining state mandated loyalty oaths, the Court held that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory," which provided grounds for invalidating loyalty oath statutes.[88] In 1967, the Court completely renounced the theory that public employment could be conditioned on sacrificing constitutional rights.[89] Although public employment cannot be conditioned on forcing a public employee to sacrifice their constitutional rights, their rights are not unfettered. Public employees' constitutional rights are burdened by the government's interests as an employer, which differ from the government's interests in regulating the public's speech.[90]

The Supreme Court has attempted to flesh out the contours of a public employee's constitutional rights. Public employee free speech issues arise almost exclusively within the context of employer retaliation suits.[91] A retaliation suit recognizes that "as a general matter the First Amendment prohibits government officials from subjecting an [employee] to retaliatory actions . . . for speaking out."[92] As the above

87. Parker, *supra* note 10, at 511 ("Until the 1950's, the government could require employees to check their first amendment freedoms at the workplace door."). *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

88. Wieman v. Updegraff, 344 U.S. 183, 185, 192 (1952).

89. Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." (quoting Keyishian v. Bd. of Regents, 345 F.2d 236, 239 (2d Cir. 1965))). A complete abrogation of all First Amendment rights as a means of accepting public employment has been rejected; such complete abrogation would reduce the number of people willing to undertake public employment. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 565 (1968).

90. *Pickering*, 391 U.S. at 568. ("[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.").

91. A retaliation suit arises under the theory that "[o]fficial reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" Hartman v. Moore, 547 U.S. 250, 256 (2006) (quoting Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998)).

92. *Id.* *See* 1 RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2.20 (1st ed. Supp. 2009) ("[T]he Supreme Court decisions make clear that the accommodation of the conflicting interests of the [public employee] as a citizen and the [public employee] as an employee requires a three-part test. First it must be determined whether the speech is constitutionally protected speech. Second, the employee must show that the protected speech played a substantial or motivating factor in the adverse employment decision. Third, even if the answer to the first two questions is yes, the employer may nevertheless avoid liability by showing by a preponderance of the evidence that school authorities would have taken the same action against the employee without considering the protected speech or considering only the disruptive nature of speech." (footnotes omitted)).

language recognizes, a retaliation claim arises only for speech protected by the First Amendment. The question in the public employment context becomes what speech is protected. Through a triumvirate of cases, the Supreme Court has sought to answer this question.

A. Pickering: *Balancing the Rights of Public Employees and Their Government Boss*

In *Pickering v. Board of Education*,[93] the Supreme Court made its first attempt at determining the extent to which the First Amendment protects public employee speech. The Supreme Court held that constitutional protection requires balancing the interests of a public employee as a citizen against the interests of the state as an employer.[94] If the employee's right as a citizen to comment on a matter of public concern outweighs the state's interest as an employer to promote efficiency, the employee's speech should be constitutionally protected.[95]

The case arose in the school context. Pickering was a teacher who was dismissed after sending a letter to a local newspaper.[96] Pickering's letter was in response to the local newspaper publishing various letters sent by the Teacher's Organization and the superintendent promoting a tax increase to support the local schools.[97] Pickering's letter was sent after the proposed tax increase failed at the polls.[98] In his correspondence, Pickering criticized the school board's handling of previous bond proposals and the disparity in fund allocation between athletics and academics.[99] Furthermore, the letter alleged the superintendent prevented teachers from opposing the bond.[100] Following a full hearing by the school board, Pickering was dismissed due to his letter's detrimental effect on the efficient operation and administration of the district's schools; and, since the letter contained false statements that "unjustifiably impugned the . . . 'integrity . . . and competence'" of school officials, that damaged professional reputations, that "would be disruptive to faculty discipline," and that fomented

93. 391 U.S. 563 (1968).

94. *Id.* at 568.

95. *Id.* ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

96. *Id.* at 564.

97. *Id.* at 566.

98. *Id.*

99. *Id.*

100. *Id.*

controversy.[101] The county circuit court and the Supreme Court of Illinois affirmed Pickering's dismissal.[102]

The United States Supreme Court reversed the decision of the Illinois Supreme Court. The Supreme Court found Pickering's comments addressed matters of public concern including a difference of opinion "as to the preferable manner of operating the school system" and "the question of whether a school system requires additional funds."[103] The Court indicated that although Pickering's comments were critical of school authorities, such statements were not per se grounds for dismissal.[104] The Court held that in order to provide grounds for dismissal, statements must do more than simply anger higher ups; they must interfere with the ability to perform duties or affect the school's ability to operate, such as destroying a superior's authority to discipline, preventing the school from raising funds, or negatively impacting working relationships with fellow employees.[105]

The Court found that none of these negative effects were present.[106] Therefore, the Court held that Pickering's right to free speech trumped the school's alleged interest in maintaining order.[107] Furthermore, the Court indicated that even if a public employee's comments are false, they cannot serve as grounds for dismissal unless they were knowingly false or recklessly made.[108] By its own acknowledgement, the *Pickering* Court refused to provide a general standard but instead established "some of the general lines along which an analysis of the controlling interests should run."[109] Subsequent decisions have added gloss to these general guidelines.

B. Connick: *Increasing the Importance of Speech on Matters of Public Concern*

In *Connick v. Myers*, [110] the Supreme Court readdressed *Pickering* and emphasized the employee's interest in commenting on matters of public concern.[111] Myers served as assistant district attorney, an at-will

101. *Id.* at 564, 566–67.
102. *Id.* at 565.
103. *Id.* at 571.
104. *Id.*
105. *Id.* at 570–73.
106. *Id.*
107. *Id.*
108. *Id.* at 574.
109. *Id.* at 569.
110. 461 U.S. 138 (1983).
111. *Id.* at 143.

position serving under District Attorney Connick.[112] Myers was informed that she was going to be transferred to a different section of criminal court; subsequently, she notified her supervisors that she opposed this transfer.[113] Following another notice of the upcoming transfer and a meeting with her superior Dennis Waldron, Myers prepared a questionnaire regarding office policies.[114] Before distributing the questionnaires, Myers was asked a third time about transferring, and she indicated that she would consider a transfer.[115] Shortly thereafter, Myers distributed the questionnaires to her co-workers.[116] Waldron found out about the questionnaires and contacted Connick, who then met with and fired Myers for "her refusal to accept the transfer."[117]

Myers filed suit for First Amendment retaliation. The district court held a nonjury trial on the merits of the case.[118] The trial judge's findings of fact concluded that Myers was terminated due to the questionnaire.[119] In his findings of law, the trial judge determined the questionnaire was a matter of public concern because it "relate[d] to the effective functioning of the District Attorney's Office [which] are matters of public importance and concern."[120] When balancing the employee's and State's interests, the trial judge concluded "it cannot be said that the defendant's interest in promoting the efficiency of the public services performed through his employees was either adversely affected or substantially impeded by plaintiff's distribution of the questionnaire."[121] Thus, Myers prevailed.

112. *Id.* at 140.

113. *Id.*

114. *Id.* at 141. The questionnaire solicited "the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* The notion for the questionnaire occurred after meeting "with Dennis Waldron, one of the first assistant district attorneys." *Id.* The meeting regarded Myers' concerns about office matters. *Id.* Waldron indicated that he did not believe the others in the office shared her concerns. Following this, Myers decided to do some research. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* The distribution of the questionnaires was also considered insubordination. *Id.*

118. Myers v. Connick, 507 F. Supp. 752, 753 (E.D. La. 1981), *aff'd*, 654 F.2d 719 (5th Cir.1981), *rev'd*, 461 US. 138 (1983).

119. *Id.* at 755.

120. *Id.* at 758.

121. *Id.* at 759.

> Appropriate factors to be taken into consideration in evaluating the State's interest in limiting its employees' right to speak freely are: "(1) the need to maintain harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the (employee's) proper and competent performance of his daily duties; and (4)

In reversing the district court's decision, the Supreme Court reiterated the need for public employees to maintain their rights to freedom of speech regarding matters of public concern.[122] However, with the exception of one question,[123] the Court held that Myers' questionnaire did not constitute speech on a matter of public concern because the inquiries were "mere extensions of Myers' dispute over her transfer to another section of the criminal court."[124] Since at least part of the questionnaire related to a matter of public concern, the Court applied the *Pickering* balancing test and found that Myers' speech was insubordinate and adversely affected working relationships.[125] One question on the questionnaire concerned whether the employees had confidence in their supervisors, which in and of itself had the potential to undermine office relations.[126] This holding effectively made the content of speech, whether it was on a matter of public concern a threshold test, which must be met before courts advance to the *Pickering* balancing test.[127]

In examining whether speech is on a matter of public concern, the Court indicated the analysis must be based on the speech's content,

> the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence."

Id. at 758 (quoting Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972)).

122. Connick v. Myers, 461 U.S. 138, 143 (1983). In analyzing *Pickering*, the Court indicated that "the precedents in which *Pickering* is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs." *Id.* at 144–45 (citing Roth v. United States, 354 U.S. 476, 484 (1957); New York Times v. Sullivan, 376 U.S. 254, 269 (1964); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)) (The Court emphasized the importance of public affairs and public issues in the American form of government and self-governance.). The cases following *Pickering* also attempted to safeguard speech on matters of public concern. *Id.* at 145 (citing generally Perry v. Sindermann, 408 U.S. 593 (1972); Mt. Healthy City Bd. v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979)).

123. *Id.* at 146, 149. The Court held that the inquiry into whether public employees felt pressure to work on political campaigns dealt with a matter of public concern. *Id.* at 149.

124. *Id.* at 146, 148–49. In contrast, the dissenting opinion in *Connick* believed the speech addressed matters of public concern. The questionnaire addressed "'the manner in which government is operated or should be operated,'" which "is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment." *Id.* at 156 (Brennan, J., dissenting) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

125. *Id.* at 151 (majority opinion).

126. *Id.* at 152.

127. *Id.* at 146 ("*Pickering*, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."). *See also* SCHNEIDER, *supra* note 92, § 2.20; United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995) (The *Pickering* balancing test applies if the employee's speech was as a citizen on matters of public concern but the test does not apply when the speech was on matters of personal interest.); Waters v. Churchill, 511 U.S. 661, 668 (1994) ("To be protected, the speech must be on a matter of public concern . . . .").

form, and context.[128] The Court decided that if the speech is not related "to any matter of political, social, or other concern of the community," then the speech is not a matter of public concern.[129] Thus, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[130] The Court announced that this decision should be left to the judge, indicating that "the inquiry into the protected status of speech" is a question of law.[131]

C. Garcetti: *Using a Public Employee's Job Duties to Ensure They Are Speaking as a Citizen*

By the time the Court heard *Garcetti v. Ceballos*,[132] the inquiry into whether a public employee's speech was constitutionally protected was a two-part analysis[133] performed by the judge.[134] In *Garcetti*, the Court took the opportunity to elaborate on what it means to speak as a citizen.[135] Ceballos was a deputy district attorney exercising supervisory responsibilities over other attorneys in the District Attorney's Office.[136] A defense attorney contacted Ceballos regarding inaccurate information contained in an affidavit used to obtain a search

128. *Connick*, 461 U.S. at 147–48.

129. *Id.* at 146.

130. *Id.* Private matters do not completely fall outside the protection of the First Amendment. The Court held "only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147. While it is advisable for public officials to be receptive "to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

131. *Id.* at 148 n.7.

132. 547 U.S. 410 (2006).

133. *Id.* at 418 ("*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen *on a matter of public concern*. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." (citations omitted) (emphasis added)).

134. *Connick*, 461 U.S. at 148 n.7. *But see* Shands v. City of Kennett, 993 F.2d 1337, 1342 (8th Cir. 1993) (although recognizing that the inquiry into the constitutionally protected status of speech is a question of law for the court, the Eighth Circuit recognized that "[a]ny underlying factual disputes concerning whether the plaintiff's speech is protected, however, should be submitted to the jury"). *See also* Parker, *supra* note 10, at 525–57, for a discussion of *Connick* and a proposal that policy reasons indicate that the protected status of public employee speech should be left to the jury.

135. *Garcetti*, 547 U.S. at 419–22.

136. *Id.* at 413.

warrant.[137] After efforts to comprehend the discrepancies, Ceballos drafted a memo on the issue.[138] A heated meeting was held regarding the warrant and the affidavit.[139] Despite Ceballos' efforts, the prosecution proceeded.[140] During trial, the defense called Ceballos as a witness to discuss his observations regarding the affidavit.[141]

Following the trial, Ceballos alleged he suffered adverse employment actions.[142] After administrative avenues failed, Ceballos filed suit.[143] The district court found Ceballos' speech was not protected and granted summary judgment for the employer.[144] The Ninth Circuit reversed, concluding that the memo's content regarded official misconduct, which is a matter of public concern.[145]

In its analysis, the Supreme Court recognized the two-prong test established by *Pickering* and its progeny: "whether the employee spoke as a citizen on a matter of public concern," and "whether the relevant government entity has an adequate justification for treating the employee differently from any other member of the general public."[146] The Court then elaborated on what it means to speak as a citizen, holding "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[147] Unfortunately, the Court

137. *Id.* at 413–14. After conducting an investigation, Ceballos concluded the affidavit contained misrepresentations. *Id.* Following his investigation, Ceballos discussed the discrepancies with a deputy sheriff. *Id.* Unsatisfied with the explanation, Ceballos contacted his supervisors and wrote a memorandum. *Id.*

138. *Id.* at 414. The memo was submitted to his supervisor. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 414–15.

142. *Id.* at 415. The alleged adverse employment "actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Id.*

143. *Id.* Ceballos filed an employment grievance, which was denied. *Id.* Following denial of his employment grievance, suit was filed in federal court alleging retaliation for the memo, which violated the First and Fourteenth Amendment. *Id.*

144. *Id.* The memo was written pursuant to employment duties and therefore, was not protected by the First Amendment. *Id.* Additionally, qualified immunity provided alternative grounds for granting summary judgment. *Id.*

145. *Id.* at 415–16.

146. *Id.* at 418. In order for the court to have to address the second inquiry, the answer to the first question must be affirmative. If the speech was not spoken as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *See* Connick v. Myers, 461 U.S. 138, 147 (1983).

147. *Garcetti*, 547 U.S. at 419–22. "[A] citizen who works for the government is nonetheless a citizen." *Id.* at 411. Precedent has recognized the interests served by allowing employees to speak, but have sought to balance the individual and societal interests with allowing government employees to

failed to provide a comprehensive framework for determining whether speech is pursuant to an employee's official duties.[148] However, the Court did indicate that the determination should be made after a practical inquiry.[149] The Court did not elaborate on whether the judge or the jury is to make this practical inquiry.

In summation, the Supreme Court has established a three-prong test to determine whether a public employee's speech is constitutionally protected.[150] First, the speech must be made as a citizen, which means the speech cannot be made pursuant to official employment duties.[151] Second, the speech must be on a matter of public concern.[152] Third, the Court must determine whether the government as an employer has grounds for treating the employee differently than the general public.[153]

IV. DEVELOPING A CIRCUIT SPLIT: THE CIRCUIT COURTS' INABILITY TO CONSISTENTLY ALLOCATE THE DETERMINATION OF WHETHER A PUBLIC EMPLOYEE'S SPEECH IS CONSTITUTIONALLY PROTECTED

In *Connick*, the Supreme Court exercised its power to classify issues within a trial as either questions of law or questions of fact.[154] The *Connick* Court indicated that the "inquiry into the protected status of speech is one of law, not fact."[155] Courts have questioned whether

speak and the governmental and societal interests in efficient performance of public functions. *Id.* A key distinction is that the First Amendment does not provide a means of constitutionalizing an employee's grievance.

148. *Id.* at 424.

149. *Id.* at 424–25. By indicating that the inquiry is a practical one, the Supreme Court was attempting to prevent government employers from incorporating overbroad formal job descriptions in an attempt to expand the scope of professional duties and overly-restricting their employees' First Amendment rights.

150. Whether a public employee's speech is constitutionally protected is only one aspect of a First Amendment retaliation suit. If the speech is protected, the employee must show that the protected speech was a substantial or motivating factor in the adverse employment action taken against them, meaning there must be a causal connection. *See* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The government can escape liability for an alleged constitutional violation if they provide evidence that the adverse employment would have occurred regardless of the protected speech. *Id.* Since these other factors are outside of the purpose of this Comment, they are not addressed completely. See SCHNEIDER, *supra* note 92, § 2.20, for a complete discussion of the development of the public employee speech analytical framework.

151. *Garcetti*, 547 U.S. at 421. Since Ceballos' statements were "made pursuant to his duties as a calendar deputy," his speech was not constitutionally protected and the inquiry ended. *Id.* The Court did not go on to discuss whether his speech was on a matter of public concern and did not employ the *Pickering* balancing test, which indicates the threshold nature of this prong.

152. *Id.* at 418.

153. *Id.*

154. *See supra* note 57 and accompanying text.

155. Connick v. Myers, 461 U.S. 138, 148 n.7 (1983).

Connick's classification remains undisturbed after *Garcetti*. Circuit courts have split in their attempts to ascertain if *Garcetti*'s test for determining whether speech occurs within the scope of employment alters *Connick*'s classification. The Ninth Circuit recently joined this debate in *Posey v. Lake Pend Oreille School District No. 84*.[156] The following Part provides an overview of *Posey* and an analysis of the split. This Part concludes by discussing the Ninth Circuit's holding that the protected status of a public employee's speech is a mixed question of law and fact.

A. The Circuit Split

In *Posey*, the Ninth Circuit addressed whether the inquiry into the protected status of speech is a question of law or fact. The court stated it was clear that prior to *Garcetti* the "two-stage inquiry into the protected status of the speech was purely legal."[157] However, the court noted that *Garcetti* added a third prong to the test, "requiring a determination [as to] whether the plaintiff spoke as a public employee or instead [as] a private citizen;" this addition calls into question the previous holding that the protected status of speech is a question of law.[158] The court noted that "[o]ur sister circuits are split over the resolution of this question."[159] While *Posey* provides a brief analysis of the circuit split, the following provides a more comprehensive discussion first addressing the circuits that have held the issue to be a question of law, followed by the circuits that have held the issue to be a mixed question of law and fact.

1. The Inquiry is a Question of Law

When a court classifies an issue as a question of law, it does so "ordinarily without fanfare or explanation other than the ambiguous

156. 546 F.3d 1121, 1123 (9th Cir. 2008) (the question before the court is whether in light of *Garcetti* "the inquiry into the protected status of speech in a First Amendment retaliation claim remains a question of law properly decided at summary judgment or instead now presents a mixed question of fact and law.").

157. *Id.* at 1126.

158. *Id.* at 1126–27. "Given the factual disputes presented in the record, we must therefore determine whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*, or if instead *Garcetti* has transformed it into a mixed question of fact and law." *Id.* at 1127. The need for this determination largely arises out of the Court's inability in *Garcetti* to provide a comprehensive framework to determine what constitutes the scope of an employee's duties.

159. *Id.* at 1127–28.

statement that the question presented is one of law."[160] In *Connick*, the Supreme Court provided no reason for their decision to label the protected status of speech a question of law.[161] In a similar vein, circuit courts typically provide no reason to support their view that the inquiry into the protected status of speech remains a question of law.

For instance, the Fifth Circuit Court of Appeals has indicated that whether a public employee "engaged in protected speech is a purely legal question over which we have appellate jurisdiction."[162] In *Charles v. Grief*, Charles, an African American employee of the Texas Lottery Commission, e-mailed high-ranking Commission officials regarding racial discrimination and retaliation towards minority employees, including himself.[163] Charles later sent the same e-mail to members of the state legislature.[164] Following a meeting with human resources, Charles was fired.[165]

On appeal from the district court's grant of summary judgment for Charles, the Fifth Circuit identified the inquiry into the protected status of speech as a purely legal question.[166] In making this determination, the court cited to *Williams v. Dallas Independent School District*,[167] identifying its previous proposition that in determining whether a public employee's speech is constitutionally protected, *Garcetti* merely shifted the "focus from the content of the speech to the role the speaker occupied when he said it."[168] Based on this mere shift, the Fifth Circuit relied on *Connick* for the proposition that the inquiry into the protected status of speech is a question of law.[169] Likewise, the Tenth Circuit and the District of Columbia Circuit have also extended *Connick*'s proposition that whether a public employee's speech is constitutionally protected is a question of law.[170]

160. Louis, *supra* note 57, at 1018.

161. Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) ("The inquiry into the protected status of speech is one of law, not fact.").

162. Charles v. Grief, 522 F.3d 508, 512 (5th Cir. 2008).

163. *Id.* at 509–10.

164. *Id.* at 510.

165. *Id.*

166. *Id.* at 510, 512.

167. 480 F.3d 689 (5th Cir. 2007).

168. *Id.* at 692.

169. *Charles*, 522 F.3d at 512.

170. *See* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192 (10th Cir. 2007). After *Garcetti*, the Tenth Circuit holds the analysis for a public employee's free speech retaliation claim requires five steps: whether the employee spoke pursuant to his official duties, whether the speech was on a matter of public concern, whether the employee's interests outweigh the state's interests as an employer, the speech must be a substantial or motivating factor in the detrimental employment action, and there must not be other grounds that indicate the employer would have took similar actions. *Id.* at

2. The Inquiry is a Mixed Question of Law and Fact

In contrast to the Fifth, Tenth, and District of Columbia Circuits, the Third and Eighth Circuits have, to some extent, questioned the view that the constitutionally protected status of speech is a question of law.[171] In a pre-*Garcetti* case, the Eighth Circuit, while recognizing that the inquiry into the protected status of speech is a question of law for the court,[172] indicated that "[a]ny underlying factual disputes concerning whether the plaintiff's speech is protected, however, should be submitted to the jury."[173] The court indicated that it is responsible for combining the jury's factual findings with the court's legal conclusions to determine whether the plaintiff's speech is protected.[174]

Unlike the Eighth Circuit, the Third Circuit has expressly held the inquiry into the protected status of speech to be a mixed question of law and fact.[175] In *Foraker v. Chaffinch*,[176] the Third Circuit held that "[u]nlike the question of whether speech is protected by the First Amendment, the question of whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact

1202–03. "The first three steps are to be resolved by the district court, while the last two are ordinarily for the trier of fact." *Id.* at 1203 (citing Cragg v. City of Osawatomie, 143 F.3d 1343, 1346 (10th Cir. 1998)); *see also* Wilburn v. Robinson, 480 F.3d 1140 (D.C. Cir. 2007). After *Garcetti*, the Circuit Court for the District of Columbia still maintains the four prong analysis for a public employee free speech retaliation claim with the first two prongs being that "the public employee must have spoken as a citizen on a matter of public concern" and whether the employee's interests outweigh the government's interest. The court indicates that these first two factors are questions of law for the court to resolve. *Id.* at 1149 (citing Tao v. Freeh, 27 F.3d 635, 639 (D.C. Cir. 1994)).

171. In *Posey*, the court indicates that "[t]he Seventh Circuit has implicitly sided with the Third Circuit [holding that the constitutionally protected status of speech is a mixed question of law and fact], concluding in *Davis v. Cook County*, that summary judgment was appropriate because 'no rational trier of fact could find' that Davis's speech had been made in her capacity as a private citizen." Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1128 (9th Cir. 2008) (quoting Davis v. Cook County, 534 F.3d 650, 653 (7th Cir. 2008)). However, a more in depth glance at *Davis* indicates that the court states "[f]urther, '[t]he inquiry into the protected status of speech is one of law, not fact.'" *Davis*, 534 F.3d at 653 (quoting Connick v. Myers, 461 U.S. 138, 148 n.7 (1983)). The court goes on to say "[r]aising a First Amendment claim, without more, does not guarantee that a jury is necessary." *Id.*; *see also* Bryant v. Gardner, 587 F. Supp.2d 951, 962 (N.D. Ill. 2008) (the district court cites *Davis* for the proposition that the protected status of speech is a question of law).

172. McGee v. Public Water Supply, Dist. No. 2 of Jefferson County, Mo., 471 F.3d 918, 920 (8th Cir. 2006). "To decide whether a public employee's speech is protected by the First Amendment, a court must first determine" if the speech was spoken as a citizen on a matter of public concern. *Id.* "This is a question of law for the court." *Id.* (citing *Connick*, 461 U.S. at 148 n.7).

173. Shands v. City of Kennett, 993 F.2d 1337, 1342 (8th Cir. 1993).

174. *Id.* at 1342–43.

175. Reilly v. Atlantic City, 532 F.3d 216, 227 (3d Cir. 2008) ("'whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law'") (quoting Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007)).

176. 501 F.3d 231 (3d Cir. 2007).

and law."[177] The court held that determining whether a public employee's speech was made pursuant to their official duties is such a fact intensive inquiry that it is properly held as a mixed question of law and fact.[178] Another aspect in their holding was that as a practical matter the trial court was in a better position to determine the extent of the employee's official duties,[179] largely because of the trial court's experience in presiding over this type of litigation.[180] Believing the trial court to be in a better position to make the determination, the appellate court deferred to their factual finding, which indicates the inquiry is a question of fact.[181]

B. The Facts of Posey v. Lake Pend Oreille Sch. Dist. No. 84

Robert Posey was a former high school employee who served as a security specialist.[182] Posey developed concerns about the school's safety and emergency policies and communicated those concerns to the high school's principal.[183] When the principal failed to respond, Posey wrote a letter to his friend Steve Battenschlag, who was the school district's Chief Administrative Officer.[184] The letter addressed Posey's personal grievances and his concerns about the district's inadequate security policies.[185] Following the letter, Battenschlag and the school district's superintendent met with Posey at his home.[186] Subsequently, the principal severely reduced Posey's responsibilities.[187] At the end of

177. *Id.* at 240.

178. *Id.* *But see* Gorum v. Sessoms, 561 F.3d 179, 184 (3d Cir. 2009) (whether speech is protected is a question of law).

179. *Foraker*, 501 F.3d at 240–41.

180. *Id.* (citing Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006)).

181. *Id.*

182. Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1123–24 (9th Cir. 2008).

183. *Id.* at 1124.

184. *Id.* ("The letter was copied to the Superintendent Mark Berryhill," and two other administrators.).

185. *Id.* The letter contained both personal grievances and concerns about inadequate safety. *Id.* The personal grievance dealt with how the principal treated and dealt with Posey. *Id.* The letter specifically addressed Posey's concerns about inadequate safety including: "(1) the administration's general unresponsiveness to safety problems, (2) inadequate staff and faculty training, (3) concealment and insufficient documentation of safety violations, (4) ineffective enforcement of truancy policies, (5) ineffective enforcement of sexual harassment policies, and (6) inadequate fire safety and school evacuation planning." *Id.* Posey supported each concern with a specific example. *Id.*

186. *Id.*

187. *Id.* at 1125. The principal reduced Posey's job responsibilities including relieving Posey's "responsibility for all specified tasks except assisting with security and crime prevention, and supervising the school parking lot, grounds, and hallways." *Id.* In addition, Posey "was no longer responsible for liaising with police, enforcing truancy policies, searching students, and investigating student misconduct." *Id.*

the following school year, Posey's responsibilities were consolidated with those of three other employees, and Posey was fired.[188]

Posey filed a grievance.[189] When administrative efforts failed, Posey filed suit in state court alleging various state claims as well as a § 1983 claim asserting he was retaliated against for his letter and subsequent meeting with school officials.[190] The school district removed the case to federal court.[191] After discovery, the defendant moved for summary judgment claiming Posey's speech was made pursuant to his employment duties precluding First Amendment protection.[192] The district court granted the defendant's motion for summary judgment, and Posey appealed.[193]

C. The Ninth Circuit Holds the Analysis as to the Protected Status of a Public Employee's Speech is a Mixed Question of Law and Fact

After addressing the circuit split addressed above, the Ninth Circuit concluded that "the determination [as to] whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law."[194] In making this determination, the Ninth Circuit focused on the Supreme Court's precedent distinguishing questions of law from questions of fact instead of relying on the Court's conclusory indication in *Connick*. The Supreme Court has held that "facts that can be 'found' by 'application of . . . ordinary principles of logic and common experience . . . are ordinarily entrusted to the finder of fact.'"[195] Since *Garcetti* indicated that the scope of an employee's official duties is a practical, not a mechanical, inquiry, "the scope and content of a plaintiff's job responsibilities can and should be found by a trier of fact" by applying principles of logic and common experience.[196]

After indicating that determining the extent of a plaintiff's job duties was a question of fact for the jury, the court considered potential reasons for removing the issue from the jury. The court held that allowing the jury to make a factual determination as to a plaintiff's job

188. *Id.*

189. *Id.* Following the initial grievance, the school board determined Posey was the subject of retaliation for his letter. *Id.* However, the governing board of the district voided this conclusion. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1125–26.

193. *Id.* at 1126.

194. *Id.* at 1127–29.

195. *Id.* at 1129 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984)).

196. *Id.*

responsibilities does "not encroach upon the court's prerogative to interpret and apply the relevant legal rules."[197] Additionally, while the possibility exists that the jury's factual conclusion could be dispositive of a constitutional question, this is not grounds for removing the issue from the jury.[198] Even if an issue is a factual determination, the court is still obligated to evaluate the significance of the facts found.[199]

Regarding the disposition of the case, the court concluded a genuine issue of material fact existed as to Posey's job responsibilities, which precluded summary judgment as to whether Posey spoke as a citizen.[200] However, the court recognized that alternative grounds for summary judgment could exist in dealing with whether an employee's speech is constitutionally protected.[201] These alternative grounds included the speech not being on a matter of public concern or the presence of adequate government justification for treating the employee differently than a member of the general public.[202] With neither of the alternative grounds present in Posey's case, the Ninth Circuit reversed the district court's grant of summary judgment and remanded for further proceedings.[203]

The Ninth Circuit held that "the inquiry into the protected status of speech presents a mixed question of fact and law," specifically holding that the scope of a plaintiff's job responsibilities is a question of fact.[204] The Ninth Circuit has subsequently affirmed its holding in *Posey*.[205] In *Posey*, the court also set out a general process for addressing whether a public employee's speech is constitutionally protected. The inquiry begins by first answering the two legal questions: whether the speech was on a matter of public concern and whether the state lacked grounds to treat the employee differently than the general public.[206] If and only if the court answers these two questions in the affirmative does the issue

197. *Id.*

198. *Id.* (quoting Miller v. Fenton, 474 U.S. 104, 113 (1985)).

199. *Id.* at 1129 (citing *Bose Corp*., 466 U.S. at 500–01). "Indeed, although a fact-finder's determination as to a plaintiff's job responsibilities may at times appear in itself dispositive of the protected status inquiry, the 'rule of independent review' will always require the court independently to evaluate the ultimate constitutional significance of the facts as found." *Id.*

200. *Id*.

201. *Id.* at 1129–30.

202. *Id.*

203. *Id.* at 1130–31.

204. *Id.* at 1130.

205. *See* Eng v. Cooley, 552 F.3d 1062, 1071 (9th Cir. 2009) (determining a plaintiff's job responsibilities is a question of fact); Robinson v. York, 566 F.3d 817, 823 (9th Cir. 2009) ("[t]he scope of [plaintiff's] job duties is a question of fact.").

206. *Posey*, 546 F.3d at 1130–31.

of whether the public employee spoke as a citizen become relevant.[207] If there is a genuine issue "as to the scope and content of the plaintiff's job responsibilities," the jury must decide the extent of an employee's job duties before the court can determine in what role the employee spoke.[208]

V. TO PRESERVE THE JURY TRIAL RIGHT, DETERMINING THE CONSTITUIONALLY PROTECTED STATUS OF A PUBLIC EMPLOYEE'S FREE SPEECH MUST PARTIALLY FALL TO THE JURY AND BE LABELED A MIXED QUESTION OF LAW AND FACT

In a trial regarding public employee free speech, the right to a jury trial will almost always be present. A suit alleging First Amendment retaliation will be brought under § 1983.[209] In a § 1983 action, the parties will have a right to a jury trial if the relief sought is legal in nature.[210] A First Amendment retaliation suit requires an adverse employment action be taken against the employee,[211] which likely will result in the plaintiff seeking compensatory damages for lost wages.[212] Compensatory damages are traditionally legal relief, virtually ensuring the parties a right to a jury trial under the Seventh Amendment.[213]

Since the right to a jury trial seems to exist in a § 1983 suit for First Amendment retaliation, the remainder of this Part focuses on whether the constitutionally protected status of a public employee's free speech, specifically when determining the scope of a plaintiff's official duties, is an issue that must be decided by the jury to preserve the substance of the right to a jury trial. This analysis will take place using three of the four *Markman* factors: (1) historical analogy; (2) functional considerations; and (3) the importance of uniformity.[214] The fourth *Markman* factor, precedent, will not be considered since, as indicated by the circuit split, precedent is inconclusive.[215] One scholar argued that policy considerations should be used exclusively in determining the proper

207. *Id.* at 1131.

208. *Id.* Judgment is reserved until after the fact-finding process so that the jury may determine the plaintiff's job responsibilities. *Id.*

209. *See supra* notes 47–56 and accompanying text.

210. *See supra* notes 52–55 and accompanying text.

211. *See supra* note 150. Examples of adverse employment actions include termination of employment or demotion.

212. *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 855–57 (5th ed. 2005).

213. *See supra* note 40 and accompanying text.

214. *See supra* notes 77–79 and accompanying text.

215. *See supra* notes 157–181 and accompanying text.

judicial actor.[216] Although not used exclusively, policy considerations are integrated into the *Markman* analysis. The results of the *Markman* analysis can be used to label the inquiry as one of law or fact.[217]

A. Historical Analogy

Historically, American juries have been viewed as protectors of liberty.[218] In Federalist No. 83, Alexander Hamilton indicated that the only difference between the supporters of the Constitution and its opponents when it came to the role of juries was that "the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."[219] The first Chief Justice of the Supreme Court, John Jay, in the first jury case before the Supreme Court, informed the jurors that they had the right to determine the law and the facts of the case.[220] While the historical importance of the jury is not doubted, *Markman*'s historical analogy requires an analysis as to whether the constitutionally protected status of speech was historically left to the jury at common law.[221]

At common law, there was no First Amendment. The closest analogy at common law is a seditious libel claim.[222] Within seditious libel jurisprudence, debate existed regarding the proper role of the judge and the jury.[223] Two competing viewpoints existed, each of which affected

216. Parker, *supra* note 10, at 488–501 ("Part I of this article evaluates the traditional way in which courts label issues either questions of fact or questions of law. The mechanical adhesion to the Coke maxim [*see supra* note 10] is not, however, suited to the complex issues involved in free expression cases. A better approach is to adopt a policy-based determination of what issues should be given to the jury and what issues reserved for the court.").

217. The question of law/fact dichotomy can arise without a jury trial, *see supra* note 67, but when the right to a jury trial exists and an issue must fall to the jury to preserve the jury trial right, that conclusion would provide evidence that the inquiry should be a question of fact.

218. Parker, *supra* note 10, at 496.

219. THE FEDERALIST NO. 83 (Alexander Hamilton).

220. Georgia v. Brailsford, 3 U.S. 1, 4 (1794) ("It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.").

221. *See* Markman v. Westview Instruments, 517 U.S. 370, 377 (1996) (if the "clear historical evidence that the very subsidiary question was so regarded under the English practice of leaving the issue for a jury," then the issue is required to go to the jury).

222. Parker, *supra* note 10, at 502.

223. *Id.*

the perceived role of the jury. One view was autocratic, holding that the rulers were superior to their people and that the jury's only role within a seditious libel suit was "determining whether [the] publication in fact occurred and whether it referred to a member of the ruling class."[224] In the contrasting view, the rulers were servants of the people, a theory which gave juries the primary decision-making role in a libel suit.[225]

The trial of Peter Zenger demonstrates that the debate between the conflicting viewpoints was resolved in favor of the latter. Peter Zenger, the publisher of the *New York Weekly Journal*, was prosecuted for protesting the Royal Governor's removal of the colony's chief justice.[226] Zenger's attorney argued the jury had "the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so."[227] The colonial court concluded that the issue of libel was for the jury.[228] As one scholar has noted, "[t]he Peter Zenger case firmly established that juries in the American colonies had the right to decide the libel issue."[229] The scholar went on to say "[t]he historical record strongly suggests that the Founders would insist that citizen jurors have input in resolving mixed issues of law and fact under the [F]irst [A]mendment."[230] Based on historical analogy to seditious libel cases at common law, it appears that juries should have a role in resolving the constitutionally protected status of speech.

B. Functional Considerations

"[T]he decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis."[231] When the court allocates an issue, it traditionally focuses on the sound administration of justice.[232] In considering the sound administration of justice, the various experiences of each judicial actor must be considered to determine which actor is in the best position to address the issue.[233] The best position inquiry must consider two levels of actors. First, which actor,

224. *Id.*

225. *Id.* at 503.

226. *See* Trial of John Peter Zenger, 17 Howell's St. Tr. 675 (1735), *quoted in* IRVING BRANT, THE BILL OF RIGHTS: ITS ORIGIN AND MEANING 175 (1965).

227. *Id.* at 178.

228. *Id.* at 179.

229. Parker, *supra* note 10, at 503.

230. *Id.*

231. Miller v. Fenton, 474 U.S. 104, 112–14 (1985).

232. *Id.* at 114.

233. *Id.*

the judge or the jury, within the trial court is in the best position; second, is the trial court or the appellate court in a better position to make the determination?

At the trial court level, the jury is in a better position to determine the scope of an employee's duties. The *Garcetti* Court indicated that the inquiry into whether a public employee's speech is made pursuant to the employee's official duties must be a practical inquiry requiring more than simply looking at a formal job description.[234] With the practical nature of the inquiry in mind, the jury is likely more competent to make the determination than the judge. The Court has also held that a § 1983 suit sounds in tort law.[235] Similarity to tort law allows for comparison to a tort suit holding an employer liable for their employees' actions under a theory of respondeat superior.

To hold an employer liable under a theory of respondeat superior, the jury must determine "whether [the] employee was acting within the course and scope of his job."[236] In making this determination, the judge usually applies the set of facts, whether undisputed or found by the jury, to the legal standard.[237] The theory behind allowing the jury to decide this type of question is that jury members have a variety of real world experiences that judges often lack.[238] Additionally, a group of people tend to "know more of the common affairs of life than does one man [and] . . . can draw wiser and safer conclusions from . . . facts . . . than can a single judge."[239] When it comes to making "subjective judgments based on peoples' experiences and perceptions of the world," such as determining the scope of an employee's official duties, these judgments are "best made by a group, rather than by a single individual."[240] Jurors are in a better position to make practical determinations than are trial judges.

The best position inquiry needs to take into account whether the trial or appellate court is in a better position. This inquiry is necessary due to the differences in appellate review regarding a question of law and one of fact. A factual finding is given deference and will only be overturned if it is clearly erroneous.[241] Labeling an issue as a question of fact significantly raises "the height of the hurdles over which an appellant

234. Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006).

235. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 709 (1999).

236. Warner, *supra* note 3, at 111.

237. *Id.*

238. Reytblat, *supra* note 4, at 196.

239. Sioux City &. Pac. R.R.Co. v. Stout, 84 U.S. 657, 663–64 (1873).

240. Reytblat, *supra* note 4, at 197.

241. Hofer, *supra* note 2, at 233.

must leap in order to prevail on appeal."[242] An inherent difference exists between trial and appellate courts, which is a partial source for the level of deference given to factual findings. Trial courts have the benefit of live testimony while appellate courts are bound to the cold record.[243] Live testimony provides the opportunity "to view the demeanor of witnesses and assess their credibility."[244] To analyze whether the appellate court should defer to the findings of a trial court, scholars have developed a functional analysis looking at whether the trial court's determination was based upon:

> (1) An assessment of the credibility of any witnesses? (2) A weighing of conflicting testimony? (3) A weighing of conflicting evidence? and (4) The application of a statute within the particular expertise of that tribunal? Negative answers to all these questions suggest that the issue is one to which little deference should be paid — conventionally, an issue of law. Affirmative answers to any of these questions suggest that the issue is one to which some deference should be paid — conventionally, one of fact.[245]

Using this functional analysis, it appears that the trial court is in a better position to determine the scope of a public employee's duties. As stated in *Garcetti*, the scope of an employee's duties is not based on a written job description. Instead, it is a practical inquiry. Questions must be answered such as: What tasks did you perform on a daily basis? How often did you perform a particular task? What was your understanding of your job? These are all questions answered while the employee is testifying. The employer will also have to answer similar questions creating the potential for conflicting testimony. With this in mind, there would be affirmative answers to at least the first three functional analysis questions. The importance of the live record indicates that the appellate court must pay deference to the trial court's determination[246] indicating that the issue is likely one of fact.

Court efficiency also plays a role in allocating authority to the trial court over the appellate court. In modern America, a litigation explosion burdens the court system.[247] The appellate courts, through

242. *Id.* at 232.

243. *Id.*

244. *Id.* at 238 (quoting State v. Pepin, 328 N.W.2d 898, 900 (Wis. Ct. App. 1982)).

245. *Id.* at 242.

246. *See* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 664 (1971) (one reason for an appellate court deferring to the trial court is the superiority of the trial court's position in being present at the time; conferring to the trial court is especially important when a decision is "based on facts or circumstances that are critical to decision and that the record imperfectly conveys").

247. Louis, *supra* note 57, at 1013.

their crowded dockets and busy time schedules, receive the brunt of the adverse affects of this explosion, which has resulted in a "modern shift in power towards the trial level."[248] When it comes to mixed questions, it makes sense to allocate them to the discretion of the trial court and limit the standard of appellate review. If the standard of review is not limited and appellate courts more frequently review the issues de novo, the "appellate courts would have to steal the necessary additional time from the law-declaring function, which has already received short shrift in this era of crowded dockets."[249] In addition, increased de novo review would further burden the appellate courts' time due to a likely increase in frivolous appeals. In many issues involving mixed questions, appellate courts also do not have any "special competence . . . and would not necessarily decide them [any] better than would trial level fact finders."[250] As a matter of efficiency, policy considerations favor trial level decision-making with a limited standard of appellate review,[251] which are hallmarks of a question of fact.

Court efficiency also provides further functional considerations outside of comparing the positions of trial and appellate courts. A potential fear of turning the constitutionally protected status of speech into a mixed question of law and fact is that it will diminish the court's ability to grant summary judgment. However, even if one inquiry is reserved for the jury, the court still maintains its judicial screening role.[252] The judicial screening role "entails regulating the actions of the parties to ensure that the adjudicative process unfolds in a way that comports with systemic norms."[253] When exercising its screening role, the court determines the appropriateness of the forum, establishes "what data may be relied upon in deciding any question, as well as whether a proposed question is appropriate," and concludes "whether reasonable minds could differ on a question posed."[254]

By determining if reasonable minds could differ, the court exercises procedural control over the proceedings.[255] Procedural control is

248. *Id.*

249. *Id.*

250. *Id.* at 1013–14.

251. Reytblat, *supra* note 4, at 211. By allocating an issue as a question of fact entitled to appellate court deference, the appellate court avoids duplicating the efforts of the trial court saving delay and time.

252. Kirgis, *supra* 14, at 1146 ("In the screening role, the judge makes many decisions involving the 'facts' of the case. Nevertheless, these decisions are not understood to implicate the Seventh Amendment.").

253. *Id.*

254. *Id.* at 1152.

255. Reytblat, *supra* note 4, at 212.

maintained regardless of whether an issue is a question of law or fact.[256] Through their procedural control, a judge can still grant a motion for summary judgment if the evidence does not create a genuine issue of material fact.[257] A judge can grant motions for judgment as a matter of law when a reasonable trier of fact could only reach one conclusion.[258] Both summary judgment and judgment as a matter of law would be permissible when speech is so clearly within the scope of an employee's duties.

Even if there is a question as to the scope of an employee's duties, the inquiry into the constitutionally protected status of speech could be tailored to consider this question last.[259] In other words, by first addressing whether the employee spoke on a matter of public concern and whether the public employee's rights are greater than the government's rights as an employer, the court can often determine the issue without reaching the factual questions. Motions for summary judgment and judgment as a matter of law can still be granted based on the other prongs of the inquiry. This procedural control allows the court to eliminate frivolous claims while providing meritorious claims with a more in-depth analysis.

C. The Importance of Uniformity

Within the context of public employee free speech, the quest for uniformity is illusory.[260] For the Supreme Court, uniformity does not appear to be a concern. In *Pickering*, the Court indicated that they were merely providing some general guidelines, not a comprehensive standard.[261] The *Garcetti* Court also failed to provide a standard.[262] In addition, the Court also held that job descriptions do not determine the

256. *Id.*

257. FED. R. CIV. P. 56(c).

258. FED. R. CIV. P. 50.

259. *See supra* notes 206–208 and accompanying text.

260. Parker, *supra* note 10, at 543 ("The Court's quest for uniformity, however, is largely illusory. Notably absent from *Connick* and its progeny is any guidance for judges facing future first amendment claims. What quantum of 'inefficiency' will be tolerated before the disruption caused by an employee's speech will destroy the right to speak? How many recipients are necessary to make a credit report a matter of public concern? Clearly *Connick* will allow judges who are most sympathetic to employees to rule in favor of first amendment claims and will also allow judges who pay greater deference to 'at will' employment interests in government agencies to hold first amendment claims to be frivolous. Whatever the philosophical bent of judges faced with future free speech claims, each judge may, in effect, be applying his or her individual 'community mores' standard to determine how much 'free' speech will be tolerated.").

261. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

262. *See supra* note 148–149 and accompanying text.

scope of an employee's duties, virtually eliminating any uniform method of determining such duties. Any hope of salvaging a uniform means of deciding the scope of an employee's duties was destroyed when the Court indicated that it was a practical inquiry.

"Unlike the declaration of a judge, a jury verdict carries no precedential value. . . ."[263] Some areas of the law require uniformity and certainty,[264] which can trump any consideration in favor of a jury. When considering the importance of uniformity, two factors should be measured: "(1) the likelihood of recurrence of the fact pattern to which the law is being applied in a specific case; and[,] (2) regardless of the probability of repetition of a fact pattern, whether an example of law application by a judge can realistically be expected to have an influence on prospective human behavior."[265]

Neither of these factors indicates a need for uniformity. The practical nature of the inquiry of an employee's job duties precludes these factors. A practical inquiry takes into account the individual variances of each employment situation. Meaning for each employee different facts will need to be considered to determine the scope of their official duties. The level of specificity required for a practical inquiry precludes the recurrence of fact patterns. Furthermore, the practical inquiry will vary depending on the time, context, and content of the speech. In such a fact intensive inquiry where potentially every factor can vary from case to case, it is impossible to structure a framework that would influence employer or employee behavior in any significant way. The structure of the public employee free speech analytical framework virtually precludes any possibility for uniformity.

VI. CONCLUSION

The *Markman* factors demonstrate that a portion of the inquiry into the constitutionally protected status of speech, specifically the scope of a public employee's job duties, must fall to the jury to maintain the substance of the Seventh Amendment's right to a jury trial. By mandating that part of the inquiry falls to the jury, the issue is properly labeled a mixed question of law and fact. The practical nature of the inquiry into an employee's job duties, which will likely require witness testimony and demeanor evidence, also indicates that the jury is the proper party to decide the issue. The need for court efficiency provides

263. Parker, *supra* note 10, at 501.

264. *See supra* note 82 and accompanying text.

265. Parker, *supra* note 10, at 501 (citing Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1926–27 (1966)).

support for labeling the issue a question of fact. Appellate courts review findings of fact with deference, which save judicial resources by avoiding repetitive analysis.

By mandating that the scope of an employee's duties is to be decided by the jury, the inquiry into the constitutionally protected status of speech becomes, as indicated by the Third and Ninth Circuits, a mixed question of law and fact. As a means of maintaining efficiency, the Ninth Circuit provided an adequate procedure for addressing the protected status of a public employee's speech. First, the court should address the legal questions: determining if the speech was on a matter of public concern and if the government had grounds for treating the employee differently than the general public.[266] If the case cannot be resolved based on legal questions, the court then addresses whether the public employee spoke as a citizen.[267] If there is a genuine issue "as to the scope and content of the plaintiff's job responsibilities," the jury must decide the extent of an employee's job duties before the court can determine in what role the employee spoke.[268]

266. Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1130–31 (9th Cir. 2008).

267. *Id.* at 1131.

268. *Id.* (Judgment is reserved until after the fact-finding process so that the jury may determine the plaintiff's job responsibilities).